***THE HON'BLE SRI JUSTICE D.S.R.VARMA**

+W.P.NO.5409 OF 2005

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%09-09-2005

#The Indian Iron and Steel Co., Limited,

rep., by its Managing Director/Assistant General Manager (Sales),

Regd. Office at IISCO House 50 M Chowrangi Road, Kolkata. .....PETITIONER

Vs.

$ M/s. Tiwari Road Lines, rep., by Proprietor D.K.Tiwari,

S/o. late S.P.Tiwari, aged about 44 years,

residing at 23-7-270/B First Floor,

Nizambagh, Hyderabad. .....RESPONDENT

!Counsel for the Petitioner: SRI O.MANOHAR REDDY

^Counsel for the Respondent: SRI C.B.RAM MOHAN REDDY for

SRI SHARAD SANGHI

<Gist :

>Head Note:

?Cases referred:

(1). 2003 4 SUPREME COURT 465

(2). 2001 (4) ALT 45 (D.B)

(3). 2002 (1) ALT 401(D.B)

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

FRIDAY, THE NINTH DAY OF SEPTEMBER
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE D.S.R.VARMA

AND
THE HON'BLE MS. JUSTICE G.ROHINI

WRIT PETITION NO : 5409 of 2005

Between:

The Indian Iron and steel Co., Ltd., rep., by its

Managing Director/Assistant General Manager (Sales),

Regd office at IISCO House, 50 M Chowrangi Road, Kolkata.

..... PETITIONER

AND

M/s. Tiwari Road Lines, rep., by Prop. D.K.Tiwari,

S/o. Late S.P.Tiwari, R/o.23-7-270/B, First floor,

Nizamabagh, Hyderabad.

.....RESPONDENT

Counsel for the Petitioner: SRI O.MANOHER REDDY

Counsel for the Respondent: **SRI C.B.RAM MOHAN REDDY for**

SRI SHARAD SANGHI

THE HONOURABLE MR.JUSTICE D.S.R.VARMA

AND

THE HONOURABLE MS.JUSTICE G.ROHINI

W.P.NO.5409 OF 2005

ORDER: (**per Hon'ble Mr. Justice D.S.R.Varma**)

Heard both sides.

2. The order, dated 27-12-2004, passed by the Chief Judge, City Civil Courts, Hyderabad, allowing the petition O.P.No.2217 of 2003 and appointing a retired Judicial Officer as sole arbitrator to decide the dispute between the parties, is under challenge in the present Writ Petition.

3. O.P.No.2217 of 2003 was filed under Section-11 of the Arbitration and Conciliation Act, 1996 (for brevity "the Act") for appointment of Arbitrator for adjudicating the dispute between the parties.

4. The petitioner herein is the respondent and the respondent herein is the petitioner before the Court below in O.P.No.2217 of 2003.

5. The facts, which are not in dispute, are that the respondent is a transporter doing transportation business. The petitioner is a public limited company. Both the parties have their Head Offices at Kolkata. They have their branch offices at Hyderabad also. The respondent has to transport the material to different parts of the country as required by the petitioner.

6. Be that as it may, for some reasons, the details of which are not worth mentioning, the petitioner had invoked the Bank Guarantee for a sum of Rs.5,00,000/- given by the respondent through the Indian Oversees Bank, Pathargatty Branch, Hyderabad. A decision was taken by the petitioner through proceedings, dated 16-09-2003, to invoke the Bank Guarantee furnished by the petitioner. Aggrieved by the said decision, on 17-09-2003, the respondent had addressed a letter to the petitioner to revoke the said proceedings invoking the Bank Guarantee. In case of failure, the petitioner sought for appointment of an Arbitrator.

7. The Indian Oversees Bank at Hyderabad addressed a letter, dated 17-09-2003, to the respondent that the Bank Guarantee has been invoked by the petitioner on 10-05-2003, and hence the respondent was called upon to pay a sum of Rs.5,00,000/- immediately.

8. However, the Bank Guarantee was invoked by the petitioner. Hence, in view of the communication by the petitioner to invoke the Bank Guarantee on 16-09-2003 and the letter addressed by the respondent to revoke the same or otherwise seeking appointment of an Arbitrator, it can safely be inferred that arbitration proceedings have commenced from 17-09-2003 itself.

9. Aggrieved by the said action of the petitioner, the respondent filed O.P.No.2217 of 2003 under Secion-11 of he Arbitration and Conciliation Act, 1996 (for brevity “the Act”) before the Court below, which is the designated Court having jurisdiction as per the scheme framed by this Court.

10. After considering the rival contentions and the entire material available on record, the Court below allowed the said O.P., and appointed an Arbitrator. Hence, the present Writ Petition.

11. Mr. O.Manohar Reddy, the learned counsel appearing on behalf of the petitioner contended that the respondent was appointed as contractor to transport the material to different parts of the country, as required by the petitioner, for a period of two years commencing from 17-05-2003 to 16-05-2005; that some quantity was also transported; that as per Clause-2.6 of the General Conditions of the Contract (for brevity “the GCC”), bills should be accompanied by distance certificate obtained from the competent authority from Kolkata; that in spite of the application for distance certificate was there, no such certificate could be obtained; that though this fact was informed to the petitioner, still the petitioner was insisting on the same and proceeded further by invoking arbitration Clause-13.1; that the petitioner further proceeded with invoking the Bank Guarantee of Rs.5,00,000/- furnished by the respondent at the time of tender. It is the contention of the petitioner that the contractor had taken the contract to lift the material and without intimating the petitioner in fact stopped supplying the material for transportation due to which the petitioner suffered heavy loss and the time bound projects could not be completed and commissioned.

12. It is his further contention that the Court below has no jurisdiction to entertain the present O.P., for appointment of Arbitrator since the tender was signed by both the parties at Kolkata; that no cause of action arose at any point of time within the territorial jurisdiction of the Court below.

13. It is also on record that earlier the Court below by order, dated 31-03-2004, allowed the said O.P., by appointing an Arbitrator. Aggrieved thereby, a Revision in C.R.P.No.5547 of 2004 had been preferred by the petitioner and this Court, by order, dated 03-12-2004, remanded the matter back to the Court below to dispose of the matter on the ground that the Court below did not consider the question of 'territorial jurisdiction'.

14. Upon such remand, the Court below, which is the designated Court, having formulated the point for consideration with regard to jurisdiction to entertain the O.P., virtually held that the said Court had jurisdiction and appointed an Arbitrator.

15. Hence, the points that fall for consideration before this Court are:

> (i). Whether the Court below has jurisdiction to entertain the O.P., filed by the petitioner or not?
>
> (ii). Whether the present Writ Petition filed, under Article 226 of the Constitution of India, challenging the impugned order passed by the Court below is maintainable or not?

16. ***In Re Point No.1***: The issue of '*jurisdiction*' and '*cause of action*' are two aspects, which are interrelated and inter dependant as well. We have considered this aspect elaborately in the judgment rendered by us in C.M.A.No.529 of 2005.

17. The aspect of '*cause of action*' is not defined anywhere and it is only that Court in whose jurisdiction the '*cause of action*' did arise will have jurisdiction to entertain an application either under Section-9 or under Section-11 of the Act.

18. In the instant case, the facts, which are on record and not in dispute, are that (a) the Bank Guarantee was furnished by the respondent through Indian Oversees Bank, at Hyderabad and the petitioner had invoked the said Bank Guarantee for the alleged losses suffered by it; (b) that the petitioner has its subordinate office at Hyderabad and that (c) the seating of arbitration is not mentioned in the GCC.

19. In C.M.A.No.529 of 2005, this Court had considered the aspect of '*cause of action*' basing on the judgments of the apex C0urt in ***FOOD CORPORATION OF INDIA vs. EVDOMEN CORPORATION*** (1999) 2 SCC 446, and ***NEW MOGA TRANSPORT CO. vs. UNITED INDIA INSURANCE COMPANY LTD*** (2004) 4 SCC 677, and took the view that the overall circumstances on record and the nature of business that is being carried on and also the terms and conditions between the parties have to be taken into consideration for the purpose of '*cause of action*'. It was further held that for the purpose of '*cause of action*' *vis-à-vis* 'jurisdiction' Section-120 of the Code of Civil Procedure has to be made applicable. If the ingredients of Section-20 of the Code of Civil Procedure in conjunction with the provisions of Section-120 of the Code of Civil Procedure are applied, in view of the fact that the Bank Guarantee had been furnished by the respondent at Hyderabad and the same was invoked by the petitioner at Hyderabad and as the nature of business is transportation all over the country as per the requirements of the petitioner, the '*cause of action*' in the present case can be said to have arisen at least partially at Hyderabad. Therefore, the Court below shall have to be treated as the '*designated Court*' having jurisdiction.

20. Hence, we uphold the elaborate, cogent and convincing reasons given by the Court below in this regard i.e., '*jurisdiction*', in the

impugned order.

21. In fact, all these questions need not be gone into and more academic in nature, in the light of the judgments rendered by the apex Court in (1). ***STATE OF ORISSA vs. GOKULANANDA JENA,*** and the Division Benches of this Court in (2). ***UNION OF INDIA vs. VENGAMAMBA ENGINEERING CO***. and (3). ***G.M. SOUTH CENTRAL RAILWAY vs. CH. KOTAIAH***.

22. In ***UNION OF INDIA vs. VENGAMAMBA ENGINEERING CO*** (2 supra), a Division Bench of this Court held, *inter alia,* that the question of jurisdiction of the Arbitrator could also be raised before the Arbitrator.

23. In ***G.M. SOUTH CENTRAL RAILWAY vs. CH. KOTAIAH*** (3 supra), it was held by another Division Bench of this Court that when an order is passed by the Chief Justice appointing an Arbitrator under Section-11 (6) of the Act, the said order is not amenable to the jurisdiction of the High Court under Article 226 of the Constitution of India.

24. In view of the above settled legal position, we hold that the Court below has jurisdiction to entertain the O.P., filed by the petitioner. Accordingly, Point No.1 is answered in favour of the respondent and against the petitioner.

24. ***<u>In Re Point No.2</u>***:-- (Regarding maintainability of the writ petition);--

In ***STATE OF ORISSA vs. GOKULANANDA JENA*** (1 supra), relied on by the learned counsel appearing for the petitioner, a two-judge Bench of the apex Court, while referring to the decision of the Constitution Bench of the apex Court in *KONKAN RAILWAY CORPN. LTD vs. RANI CONSTRUCTION PVT. LTD* ((2000) 2 SCC 388), explained the jurisdiction of the

apex Court and the High Courts, under Article 136 and 226 of the Constitution of India respectively, in relation to appraising of the issue of appointment of Arbitrator by the designated court, on merits, and held that appointment of Arbitrator is amenable to the writ jurisdiction of the High Courts under Article 226 of the Constitution of India. However, it was further held that all the areas of dispute, including the appointment of Arbitrator and the jurisdiction of the Arbitrator to decide the dispute can be decided by the Arbitrator himself and the High Court under Art.226 of the Constitution of India is not obliged to go into the same. This is obviously in view of the specific provisions contained in Section 16 (2) of the Act, which postulates that the Arbitrator himself can decide his own jurisdiction.

25. Their Lordships of the apex Court in ***State of Orissa vs. Gokulananda*** (1 supra) precisely held thus (at paragraphs 7 and 8 at p.468 of SCC):

"The Constitution Bench in the case of Konkan Rly. Itself has held that an order which is the subject of the petition for special leave to appeal under Article 136 must be an adjudicatory order, that is, an order which has adjudicated upon the rival contentions of the parties. In that context, this Court in Konkan Rly. Case has held that an order made by the Designated Judge under Section 11(6) of the Act is not an order in which the Designated Judge adjudicates parties' rights, hence, it is in the nature of an administrative order against which an appeal under Article 136 does not lie. This Court in that judgment has not stated that an order being an administrative order, the same cannot also be challenged under Article 226 of the Constitution for good and valid reasons. Therefore, in our opinion, the High Court was wrong in coming to the conclusion that an order made by the Designated Judge under Section 11(6) of the Act is not amenable to the writ jurisdiction of the High Court.

However, we must notice that in view of Section 16 read with Sections 12 and 13 of the Act, as interpreted by the Constitution Bench of this Court in Konkan Rly (2002) 2 SCC 388), almost all disputes which could be presently contemplated can be raised and agitated before the arbitrator appointed by the Designated Judge under Section 11(6) of the Act. From the perusal of the said provisions of the Act, it is clear that there is hardly any area of dispute which cannot be decided by the arbitrator appointed by the Designated Judge. If that be so, since an alternative efficacious remedy is available before the arbitrator, a writ court normally would not entertain a challenge to an order of the Designated Judge made under Section 11(6) of the Act which includes considering the question of jurisdiction of the arbitrator himself.

Therefore, in our view, even though a writ petition under Article 226 of the Constitution is available to an aggrieved party, ground available for challenge in such a petition is limited because of the alternative remedy available under the Act itself".

26. Reverting back to the instant writ petition, since the Arbitrator had already been appointed by the Court below, having gone into the question of jurisdiction also, as directed by this Court in the order, dated 03-12-2004, in C.R.P.No.5447of 2003, and in view of the fact that the other questions are only pure questions of fact, the same need not be gone into by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

27. Accordingly, Point No.2 is also answered in favour of the respondent and against the petitioner.

28. Having regard to the foregoing discussion, we hold that the writ petition is without merit and the same is liable to be dismissed.

29. In the result, the writ petition is dismissed, however, without costs.

D.S.R.VARMA, J

G.ROHINI, J

09TH SEPTEMBER 2005

L.R.COPY TO BE MARKED:

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